Chapter 4:
Request Procedures

A. Written Request

The PIA envisions a written request. SG §10-614. However, types of records predesignated for immediate release under SG §10-613(c) are to be made available without need for a written request. SG §10-614(a)(2)(i). Furthermore, the agency may waive the requirement for a written application. SG §10-614(a)(2)(ii). An agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. In other instances, a written request or the completion of an agency request form may help expedite fulfillment of the request when less commonly requested records are sought. A request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA's requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the State Government Article.

In general, there is no requirement that the applicant give the reason for a request or identify himself or herself, although he or she is certainly free to do so. The reasons for which the information is sought are generally not relevant. See Moberly v. Herboldsheimer, 276 Md. at 227; 61 Opinions of the Attorney General 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. See p. 7-2 below. Knowledge of the purpose of the request may sometimes assist a custodian who is required under SG §10-618 to make a "public interest" determination prior to releasing a record. See SG §10-614(c)(2)(i). In addition, a public institution of higher education has a right to know whether a requester seeking students' personal information is seeking records for a commercial purpose. SG §10-618(m). The identity of an

applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives a "person in interest" special rights of access.

The request must sufficiently identify the records that the applicant seeks. See Letter of advice to Deborah Byrd, Dorchester County Commissioner's Office, from Assistant Attorney General Kimberly Smith Ward (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of the records requested); see also Sears v. Gottschalk, 502 F.2d 122 (4th Cir. 1974), cert. denied, 422 U.S. 1056 (1975) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency may appropriately assist an applicant to clarify a request when feasible.

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor, – without stating an organizational affiliation and without invoking the powers granted under the audit statute (SG §§2-1217 to 2-1227) – requests information from an agency that is not the subject of the audit, the agency that receives the request should treat it as a request subject to all of the procedures of the PIA, including the requirement of a written application. 76 Opinions of the Attorney General 287 (1991).

B. Time for Response

Under SG §10-614(b)(2), if a record is found to be responsive to a request and is recognized to be open to inspection, it must be produced "immediately" after receipt of the written request. An additional reasonable period "not to exceed 30 days" is available only where the additional period of time is required to retrieve the records and assess their status under the PIA. A custodian should not wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond. If access is to be granted, the record should be produced for inspection and copying promptly after the written request is evaluated. Similarly, when access to a record is denied, the custodian is to "immediately" notify the applicant. SG §10-614(b)(3)(i). Within ten working days after the denial, the custodian must provide the applicant with a written statement of the reasons for the denial in accordance with SG §10-614(b)(3)(ii). This 10-day period is in

addition to the maximum 30-day or (with an agreed extension) 60-day periods for granting or denying a request. Stromberg Metal Works, Inc. v. University of Maryland, 382 Md. 151, 158-59, 854 A.2d 1220 (2004). However, in practice, the denial and explanation generally are provided as part of a single response.

There appears to be some conflict between the "immediate" access requirement of SG §10-614(b)(2) and the 30 days allowed by SG §10-614(b)(1) to grant or deny a request. This conflict is resolved, however, if the custodian immediately grants access where the right to access is clear. If the custodian, after an initial review of the records, determines that there is a question about the applicant's right to inspect them, then a period of up to 30 days may be used to determine whether a denial is authorized and appropriate. If the problem is that the request is unclear or unreasonably broad, the custodian should promptly ask the applicant to clarify or narrow the request. The custodian should not wait the full 30 days and deny the request only because it is unclear or unreasonably broad.

The 30-day time periods in SG §10-614(b)(1) and (2) and the other time periods imposed by SG §10-614 may be extended, with the consent of the applicant, for an additional period not to exceed 30 days. SG §10-614(b)(4).

A troubling question is presented where the custodian, acting in good faith, is unable to comply with the time limits set by the PIA. For example, a custodian may have trouble retrieving old records and then, after retrieval, may find that portions of the records must be redacted to protect confidential material from disclosure. Even with due diligence, the custodian may be unable to comply with the request within the time limits set by the PIA. If an extension is not obtainable under SG §10-614(b)(4), the custodian should make the best good faith response possible by: (1) allowing inspection of any portion of the records that are currently available; and (2) informing the applicant, within the imposed time limit, of the reasons for the delay and an estimated date when the agency's review will be complete.

This course should be followed only when it is impracticable for the custodian to comply with the PIA's time limits. Every effort should be made to follow the PIA's time limits. Under FOIA, if an agency can show that exceptional circumstances exist and that

it is exercising due diligence in responding to a request, courts have allowed the agency additional time. See Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) (court allowed FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded); see also Exner v. FBI, 542 F.2d 1121 (9th Cir. 1976); Hayden v. Department of Justice, 413 F. Supp. 1285 (D.D.C. 1976). Other courts have resisted agency efforts to maintain a routine backlog of FOIA requests. See Ray v. Department of Justice, 770 F. Supp. 1544 (S.D. Fla. 1990) (routine administrative backlog of requests for records did not constitute "exceptional circumstances" allowing agency to respond outside FOIA's 10-day requirement). Accord, Mayock v. INS, 714 F. Supp. 1588 (N.D. Cal. 1989), rev'd, 938 F. 2d 1006 (9th Cir. 1990).

While the time limits in the PIA are important and an agency or custodian may be sanctioned in a variety of ways under the statute for a failure to comply, an agency's failure to respond within the statutory deadlines does not waive applicable exemptions under the Act. "[T]he custodian [is not] required to disgorge records that the Legislature has declared should not be disclosed simply because the custodian did not communicate his/her decision in a timely manner." Stromberg Metal Works Inc. v. University of Maryland, 382 Md. 151, 161, 854 A.2d 1220 (2004).

C. Inspection

A custodian is to permit a requester to inspect records "at any reasonable time." SG §10-613(a). Agency regulations may elaborate on procedures for inspecting records. SG §10-613(b). If records are held by various custodians in different locations, an agency is not necessarily obligated to transport them to a centralized location for inspection. Ireland v. Shearin, 417 Md 401, 411-12, 10 A.3d 754 (2010). In situations where the requester is unable to personally inspect records, the agency may instead mail copies of the requested records at the requester's expense. Id.

D. Records Not in Custodian's Custody or Control

If a written request for access to a record is made to a person who is not the custodian, that person must, within 10 working days of the receipt of the request, notify the applicant of this fact and, if known, the actual custodian of the record and the location or possible location of the record. SG §10-614(a)(3).

E. Written Denial

When a request is denied, the custodian must provide, within 10 working days, a written statement of the reasons for the denial, the legal authority for the denial, and notice of the remedies for review of the denial. SG §10-614(b)(3)(ii); City of Frederick v. Randall Family, LLC, 154 Md. App. 543, 841 A.2d 10 (2004) (denial letter was legally deficient because it failed to explain reason for denying access under SG §10-618(f)(1) in connection with closed investigation). A sample denial letter is contained in Appendix B. An index of withheld documents is not required at the administrative denial stage, as long as the letter complies with SG §10-614(b)(3)(ii). Generally, a denial letter should be reviewed by the agency's legal counsel before it is sent out to ensure that the denial is correct as a matter of law and to ensure that the three elements in SG §10-614(b)(3)(ii) are adequately and correctly stated in the letter.

Before sending a denial letter and after consulting with counsel, a custodian may consider negotiating with the applicant or the applicant's attorney. The applicant may wish to withdraw or limit the part of the request that is giving the agency difficulty and thus avoid the need for a formal denial.